

RAMIRO MORALES, Bar No. 167947  
CHRISTINE M. FIERRO, Bar No. 191660  
RICHARD A. EGGERTH, Bar No. 99625  
MORALES FIERRO & REEVES  
2300 Contra Costa Blvd., Suite 310  
Pleasant Hill, CA 94523  
Telephone: (925) 288-1776  
Facsimile: (925) 288-1856

Attorneys for Plaintiff  
HDI-GERLING AMERICA INSURANCE  
COMPANY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO

HDI-GERLING AMERICAN INSURANCE  
COMPANY, a New York Corporation ,

Plaintiff,

vs.

HOMESTEAD INSURANCE COMPANY, a  
Pennsylvania Corporation; GREAT  
AMERICAN E&S INSURANCE  
COMPANY, an Ohio Corporation, formerly  
known as AGRICULTURAL EXCESS AND  
SURPLUS INSURANCE COMPANY, and  
DOES 1-10,

Defendants.

CASE NO.: CV08-1716 PJH

**HDI-GERLING AMERICAN  
INSURANCE COMPANY'S  
EVIDENTIARY OBJECTIONS TO  
MOTIONS TO DISMISS AND REPLIES  
OF HOMESTEAD INSURANCE  
COMPANY AND GREAT AMERICAN  
E&S INSURANCE COMPANY**

Date: July 9, 2008.

Time: 9:00 a.m.

Dept.: 3 (Honorable Phyllis J. Hamilton)

INTRODUCTION

Though defendants Homestead and Great America have both moved to dismiss under Rule 12(b)(6), which would normally preclude any consideration of evidence outside the pleadings, both defendants also seek to have the Court consider copies of insurance policies purportedly authenticated by declarations of defendants' employees. This forces Gerling to address the evidentiary shortcomings of said declarations, or waive the opportunity to ever do so. The objections herein are timely in that they have been made before or at the hearing, and so are not

1 waived. *See Pfingston v. Ronan Engineering Co.*, 284 F.3d 999, 1003 (9<sup>th</sup> Cir. 2002); *FDIC v. New*  
 2 *Hampshire Ins. Co.*, 953 F.2d 478, 484 (9<sup>th</sup> Cir. 1991).

3 This Court should not consider Homestead's and Great American's declarations, because of  
 4 Gerling's evidentiary objections to the authenticity of those outside-the-pleadings policies. Because  
 5 the authenticity is disputed, it is inappropriate to include the policies with a Rule 12(b)(6) motion to  
 6 dismiss.

## 7 OBJECTIONS

### 8 I. How Objections Apply To Defendants' Motions

9 Because Rule 12(b)(6) motions are disfavored and rarely granted (*see Gilligan v. Jamco*  
 10 *Devt. Corp.*, 108 F.3d 246, 249 (9<sup>th</sup> Cir. 1997); *United States v. Redwood City*, 640 F.2d 963, 966  
 11 (9<sup>th</sup> Cir. 1981)), documents from outside the pleadings may be considered by the Court in only one  
 12 circumstance applicable here: if no party questions the authenticity of the copies. *Branch v.*  
 13 *Tunnell*, 14 F.3d 449, 454 (9<sup>th</sup> Cir. 1994) (*overruled on other grounds in Galbraith v. County of*  
 14 *Santa Clara*, 307 F.3d 1119, 1127 (9<sup>th</sup> Cir. 2002)); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271,  
 15 1281 n. 16 (11<sup>th</sup> Cir. 1999). Neither Homestead nor Great American dispute this. And because the  
 16 authenticity of Homestead's and Great American's documents is disputed, the requirement for use  
 17 of outside-the-pleadings policies is not met, and so the policies may not be considered.

### 18 II. Evidentiary Standards For Declarations

19 Gerling's objections are due to defendants' failure to meet evidentiary standards for  
 20 declarations. Both Homestead and Great American motions attest to policy authenticity by way of  
 21 declarations. Homestead submits a second declaration with its reply to reiterate the original claims  
 22 of authenticity, and to add purported "facts" as to why the policies are complete and accurate. *See*  
 23 Court Docket Document no. 19, Second Declaration of Joanne Horak ("Second Horak Decl."), p. 2,  
 24 II. 12-19 (physically incorporating Ms. Horak's first declaration, Court Docket Document no. 8-2  
 25 ["First Horak Decl."]).

26 Authentication is achieved by evidence sufficient to sustain a finding that the item is what  
 27 the proponent claims it is. Fed. R. Evid. 901. Evidence submitted by declaration must meet trial  
 28 requirements of admissibility. *Travelers Cas'y & Sur'y Co. of America v. Telstar Const. Co., Inc.*,

1 252 F.Supp.2d 917, 922 (D. AZ 2003); *Beyenne v. Coleman Security Services, Inc.*, 854 F.2d 1179,  
 2 1181; Civil L.R. 7-5(b) (declarations may be stricken if do not contain only facts, do not conform to  
 3 Fed. R. Civ. P. 56(e), and/or do not avoid conclusions and argument). An authenticity declaration  
 4 must (1) be made on personal knowledge, (2) set forth facts admissible in evidence, and (3) show  
 5 the declarant's competence to testify. Fed. R. Civ. P. 56(e)(1); Civil L.R. 7-5(b).

### 6 III. Statement Of Objections

#### 7 A. Horak Declarations

8 Ms. Horak's declarations fail all three requirements. She asserts that she has "personal  
 9 knowledge of the facts stated in this declaration." That lacks foundation to establish personal  
 10 knowledge, which must be shown by *facts*, not mere conclusions. *Bank Melli Iran v. Pahlavi*, 58  
 11 F.3d 1406, 1412 (9<sup>th</sup> Cir. 1995). She offers no facts as to her personal knowledge of the policies.  
 12 She says she is a vice president (Second Horak Decl., p. 1, l. 24) and reviewed Homestead's "file  
 13 for this case" (First Horak Decl., p. 2, l. 7). But of what is she a V.P.? Research? Human  
 14 Resources? Finance? Those departments would not obviously give knowledge as to the  
 15 authenticity of policies. Even if a she is a V.P. of claims or underwriting, without explaining how  
 16 her job put her in a position to know the authenticity of the policies and files she reviewed, and that  
 17 she did indeed know that they were complete or accurate, she cannot demonstrate personal  
 18 knowledge. Mere review of an unknown file does not give ability to confirm policy authenticity.

19 The declarations also fail to set forth admissible facts. The aforementioned failure to lay a  
 20 foundation for Ms. Horak's personal knowledge is based on lack of admissible facts. And the  
 21 second declaration's assertion that "[i]n the normal course of business" any policy modifications  
 22 would be in the policy file also fails to set forth admissible facts. (Second Horak Decl., p. 2, ll. 12-  
 23 14.) There are no admissible facts as to her personal knowledge of "the normal course of business,"  
 24 how she personally knows that policy modifications would be in the policy file, or that they would  
 25 be nowhere else. If her testimony is based on what she learned from another, then of course that  
 26 would be hearsay, which is entitled to no weight in declarations. *Scosche Ind's, Inc. v. Visor Gear*  
 27 *Inc.*, 121 F.3d 675, 681 (9<sup>th</sup> Cir. 1997).

1 She also fails to establish that she reviewed the policy file, or that the policy file is the "file  
2 for this case" that her first declaration says she did review. And she finishes with an unsupported  
3 conclusion that because there are no modifying agreements in the file the policies are authentic.  
4 Second Horak Decl., p. 2, ll. 17-19.

5 None of these statements rely on facts. Because of these foundational and factual  
6 deficiencies in and leading up to these statements, they are nothing more than opinion, not fact.

7 These problems also show how the third requirement for authenticity declarations is not met,  
8 because these foundational and factual gaps prevent any conclusion that Ms. Horak is competent to  
9 testify to these matters.

10 B. Curci Declaration

11 The Declaration of Frank Curci supporting Great America's motion is also deficient. Again,  
12 his statements that he is a Claim Director and has "personal knowledge of the facts" are insufficient  
13 to establish that the policies attached are true and correct. How does that position give him personal  
14 knowledge of the policies? How is that position involved at all in obtaining and certifying copies of  
15 policies? Merely being involved in claims is not, in and of itself, a link to the custodianship of  
16 policies. His declaration fails to provide facts as to what a "certified copy" means, or how a  
17 "certified copy" is prepared, or how such preparation assures truth and accuracy. The fact that the  
18 stamped certification statement on the face of the policies is signed by someone else indicates that  
19 whatever Mr. Curci says about policy authenticity is based on what others know or have told him.  
20 This is hearsay (out-of-court statement offered for truth of the matter stated) and so inadmissible.

21 DATED: July 7, 2008

MORALES, FIERRO & REEVES

22  
23 By: 

24 Richard A. Eggerth

25 Attorneys for Plaintiff

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27 COMPANY

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